Supreme Court, U.S.
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No. 09-_____ 091549 JUN 17 2010

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In The

Supreme Court of the United States

AMR MOHSEN,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS THE RECEIPT OF A NOTE FROM A DELIBERATING JURY CONCERNING THE CHARGES IN A CRIMINAL CASE A CRITICAL STAGE OF THE TRIAL AT WHICH A DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL?

2. IS A TRIAL COURT'S FAILURE TO PERMIT DEFENSE COUNSEL TO PARTICIPATE IN PREPARING A RESPONSE TO A JURY NOTE STRUCTURAL ERROR REQUIRING REVERSAL PER SE?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Amr Mohsen respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit affirming his convictions. The two related questions presented herein concerning the Sixth Amendment – whether the receipt of a jury note is a critical stage of a trial at which the defendant has a constitutional right to the assistance of counsel, and whether the failure of a trial court to notify counsel of such a note and to permit counsel to be heard on the appropriate response – are both the subject of conflicting opinions between and among the Courts of Appeal. Supreme Court Rule 10.

OPINION BELOW

The November 25, 2009 opinion of the Ninth Circuit affirming the Petitioner's convictions is published at *United States v. Mohsen*, 587 F.3d 1028 (9th Cir. 2009), and appears at App. 1.

The February 2, 2010 order of the Ninth Circuit Court of Appeals, denying rehearing appears at App. 20.

The September 15, 2006 oral ruling of the district court denying the new trial motion appears at App. 12.

JURISDICTION

On November 25, 2009, a three judge panel of the United States Court of Appeals for the Ninth Circuit issued its published opinion affirming Petitioner's convictions. On February 2, 2010, the Court denied rehearing. On April 20, 2010, Justice Kennedy extended the time for filing the Petition for Certiorari to and including June 17, 2010.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On February 27, 2006, Amr Mohsen was convicted by a jury of conspiracy, three counts of perjury, subornation of perjury, eight counts of mail fraud, obstruction of justice, and contempt of court. On March 15, 2006, Amr Mohsen was convicted by the same jury (in the second phase of his bifurcated trial) of witness tampering and solicitation to commit arson. At the second phase, Mohsen was acquitted of the most serious allegation against him – conspiring to murder the federal judge who had presided over a prior civil trial involving Mohsen. On January 5, 2007, Mohsen was sentenced to 204 months in prison.

At the time of the events that led to his convictions, Mohsen, who earned a Ph.D. in electric engineering and applied physics from Cal Tech, was the CEO of a high tech company in Silicon Valley which held a patent on innovations created by Mohsen in complex computer circuitry. Mohsen allegedly altered dates in his engineering notebooks concerning those patented innovations, and made misstatements about those alterations in depositions in a civil case brought by Mohsen's company, Aptix, against a rival company, QuickTurn, concerning the violations by QuickTurn of the patent. The civil case against QuickTurn was dismissed with prejudice upon a finding of litigation misconduct by the plaintiffs.

Mohsen and his brother were then indicted on charges of perjury, obstructions of justice, and mail fraud arising out of the civil case. Mohsen contended

that, under relevant patent law principles, the alterations were not material, a necessary element of the phase one charges. A superceding indictment charged Mohsen with attempting to dissuade witnesses from testifying in his criminal trial and conspiring to murder the judge who had dismissed the civil case and was then presiding over the criminal case. Mohsen contended that he was entrapped into making apparently inculpatory statements by an aggressive inmate housed with Petitioner while working as a government informant.

Because the allegations of threats to witnesses, arson and the murder solicitation (the latter of which was later rejected by the jury) were based on conversations initiated by an inmate informant while Mohsen was represented by counsel, the trial court ruled that evidence of these charges could not be presented during trial of the fraud, perjury and attempt counts. Yet, over defense objections, the trial court invented a novel bifurcation procedure in which the jury first heard evidence and deliberated on the fraud charges, and then, in a second phase, heard evidence and deliberated on the charges involving attempted violence. Further, over defense objection, the trial court read the entire indictment to the jury at the outset, including the inflammatory charge of soliciting the murder of a federal judge, resulting in counsel questioning the jury repeatedly about all the charges during voir dire before the first phase of the trial. The jury thus heard allegations of the sensational murder solicitation charge before the beginning of the first

phase, and did not learn that this allegation was unsupported by credible evidence until the second phase.

The bifurcated trial procedure became further confusing when the prosecutor's closing arguments at the end of phase one of the trial suggested a new possible theory of guilt which was uncharged in the indictment, based upon a note written by Mohsen which memorialized a meeting between Mohsen and Quickturn CEO Keith Lobo (the "Lobo note"). The prosecutor suggested that this allegedly fabricated note was material to matters at issue in the civil trial, and thus to the criminal charges arising from that trial, even if the charged alterations to the notebook were not so material. The prosecutor also vouched in his phase one closing argument for the truth of all of the pending charges, by telling the jury at the conclusion of his arguments that "the truth is that the defendant is guilty of *each and every charge in the indictment,*" which, of course, included the charges of attempted violence that jurors had learned of during voir dire but which were not to be considered by them during the first phase of the trial. (ER 203) (emphasis added).[1]

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[1] Defense counsel did not object to these errors, and the court below found no reversible plain error on review. They are not raised as claims of error here, but are raised only so far as they indicate that the jury's question about the charges in the indictment was a substantive question.

During deliberations in phase one of the bifurcated trial, the jury sent the court a note asking whether there is "a copy of the indictment with the specific charges that we can see." (ER 693, 205; Dkt. 519). The trial court wrote "no" on the note and sent it back to the jury without consulting the parties. Quickly thereafter, the jury found Petitioner guilty of all of the phase one charges. Only after the jury reached their verdicts did the court inform the parties about the jury's previous note.

In a motion for a new trial, Petitioner Mohsen challenged his phase one convictions on the ground that the trial court's receipt of a jury note seeking information on a substantive matter – the nature of the charges against the defendant – was a critical stage of the trial at which Mohsen had the right to the assistance of counsel, and that the denial of his Sixth Amendment right was structural error requiring automatic reversal. After that new trial motion was denied, the Ninth Circuit affirmed the phase one convictions, holding that the trial court erred in answering the jury note without consulting counsel, but that error was neither structural nor prejudicial.

A Petition for Writ of Certiorari is taken from the decision of the Ninth Circuit Court of Appeals affirming Petitioner's phase one convictions.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The federal courts of appeals generally agree that a trial judge errs in failing to notify counsel for the parties whenever a deliberating jury sends a note seeking information on a substantive matter related to the case under consideration. The circuits are in conflict, however, on the related questions of (a) whether that error is necessarily constitutional in dimension and, if so, (b) whether that constitutional error is structural in nature, requiring reversal per se, or whether it can be found harmless if the government can prove beyond a reasonable doubt that it had no effect on the jury's verdict.

I. THE CIRCUITS ARE IN CONFLICT ON THE ISSUE OF WHETHER THE RECEIPT OF A JURY NOTE SEEKING INFORMATION FROM THE TRIAL COURT ON A SUBSTANTIVE MATTER CONSTITUTES A CRITICAL STAGE OF THE TRIAL AT WHICH THE DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL.

In this case, during deliberations in phase one of the bifurcated trial, the jury sent the court a note asking whether there was "a copy of the indictment with the specific charges that we can see." (ER 693, 205; Dkt. 519). The trial court wrote "no" on the note and sent it back to the jury without consulting the

parties. The court informed the parties about the note only after the jury reached verdicts on the phase one charges.

The failure to consult defense counsel before answering the jury's question gave counsel no opportunity to discuss the question or appropriate answer with the court, or to suggest that the question indicated that the jury was either confused about the charges in the indictment or confused about their obligation to consider only the phase one charges. The risk of confusion was a particularly palpable risk in this highly unusual bifurcated proceeding where the jury had been informed of all of the charges in the indictment (including the inflammatory phase two charges) during voir dire, but was then permitted to consider only the phase one charges initially. Nor did counsel have an opportunity to raise with the court issues regarding the jury note's references both to the charges and the indictment, in light of the prosecutor's closing argument which suggested (A) that *all* of the charges in the indictment were true (including the phase two charges which had not yet been presented), and (B) that the jury could convict Mohsen on a new theory of guilt not contained in the indictment, specifically that a note regarding a meeting with QuickTurn CEO Keith Lobo was material to the underlying civil suit, even if the alterations to the inventor's notebooks and false testimony which were charged in the indictment were immaterial. In Mohsen's motion for new trial, his trial counsel indicated that they would have asked the trial court

to respond substantively to the jury and to address these issues had the trial court informed counsel of the jury note before the verdict was reached. (RT 9/15/06 19-21).

On appeal, Mohsen argued that the trial court's refusal to consult counsel before responding to the jury note deprived Mohsen of counsel at a critical stage of the proceedings requiring reversal per se. *United States v. Cronic*, 466 U.S. 648, 658-659 (1984). A panel of the Ninth Circuit disagreed. While not addressing the issue of whether the trial court's receipt of the jury's note had been a critical stage of the trial, the panel held that the conceded error was subject to a prejudice analysis and found that the error was harmless beyond a reasonable doubt. *United States v. Mohsen*, 587 F.3d 1028, 1031-1032 (9th Cir. 2009).

The issue the panel did not address – whether the receipt of a jury note constitutes, by definition, a critical stage of a trial – is crucial to determining the standard of prejudice to be applied to the error under this Court's jurisprudence.

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or *prevented from assisting the accused during a critical stage of the proceeding. See, e.g., Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) [overnight recess during trial]; *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) [final argument]; *Brooks v. Tennessee*,

> 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) [decision of defendant whether to testify]; *Hamilton v. Alabama*, 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961) [arraignment]; *White v. Maryland*, 373 U.S. 59, 60, 83 S.Ct. 1050, 1051, 10 L.Ed.2d 193 (1963) (per curiam) [entry of plea before a magistrate]; *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961) [direct examination of accused]; *Williams v. Kaiser*, 323 U.S. 471, 475-476, 65 S.Ct. 363, 366, 89 L.Ed. 398 (1945) [entry of guilty plea].

Cronic, 466 U.S. at 659 n.25 (emphasis added).

It is also an issue as to which the federal appellate courts are in conflict. The en banc decision controlling on this point in the Ninth Circuit holds that the receipt of a jury note is a critical stage of a trial at which the right to counsel must be honored. *Frantz v. Hazey*, 533 F.3d 724, 743 (9th Cir. 2008) (en banc) ("Because of the delicate nature of such mid-deliberation inquiries, we have recognized that defendants or their attorneys have a due process right to be present in conferences when jurors' notes are discussed."); *see also Frantz*, 533 F.3d at 746 (Kozinski, J., concurring) ("Consideration of a jury note in the midst of deliberations is a critical stage of the proceedings where both sides are entitled to express their views."). Likewise, in *United States v. Desir*, 257 F.3d 1233, 1238 (11th Cir. 2001), the Eleventh Circuit considered whether a response to a jury note was a critical stage of the proceedings in a related context.

The defendant contended that the magistrate inappropriately exercised the authority of an Article III judge by responding to a jury question without the defendant's consent. The Court had no trouble finding that the magistrate had exceeded his authority, because response to a jury note was a "critical stage" of the proceedings. *Id.*

Similarly, in *Curtis v. Duval*, 124 F.3d 1 (1st Cir. 1997), the First Circuit stated that "recalling the jury for supplementary instructions after deliberations are underway is a critical stage of a criminal trial." *Id.* at 4. Similarly, in *Baugh v. Swenson*, 279 F. Supp. 642, 643-645 (D.Mo. 1968), in the absence of defense counsel, the trial court engaged in a colloquy with the deliberating jury in which it informed the jury that the answer to its question about consideration of sentencing was contained in the prior instructions. The District Court of Missouri found the response to the jury's note was a "critical stage" of the proceedings. *Id.*

By contrast in *Hudson v. Jones*, 351 F.3d 212 (6th Cir. 2003), *cert. denied*, 543 U.S. 880 (2004) a divided panel of the Sixth Circuit found no "critical stage" where a court answered a jury question by repeating instructions previously given. *Hudson*, 351 F.3d at 216-218. The Fifth Circuit has agreed with this analysis. *United States v. Hillsman*, 480 F.3d 333, 335-336 (5th Cir.), *cert. denied*, 552 U.S. 863 (2007) (citing *Hudson* for the proposition that "the 'rereading of identical jury instructions is not a critical stage of a criminal trial'"). Similarly, in *United States v.*

Morrison, 946 F.2d 484 (7th Cir. 1991), the Seventh Circuit found no "critical stage" where the trial court read previously agreed upon instructions to the jury in the absence of counsel; "the court's *reading* of the jury instructions (as opposed, perhaps[,] to a court's jury instruction conference with counsel) [is not] a critical stage of the proceedings." *Id.* at 503 (original emphasis).

The Third Circuit also found no critical stage, but did find a constitutional violation, where the trial judge responded to a jury request by submitting portions of the testimony that the jury had already heard in the presence of counsel, without notifying counsel of the jury's request. The Court held the constitutional error, however, could be found harmless beyond a reasonable doubt. *United States v. Toliver*, 330 F.3d 607, 614-616 (3d Cir. 2003), *cert. denied*, 540 U.S. 1185 (2004).

The Ninth Circuit, however, has explicitly disagreed with these courts on this issue. *Musladin v. Lamarque*, 555 F.3d 830, 842 & nn. 9 & 10 (9th Cir. 2009) ("To the extent that those cases can be read as resting the *Cronic* assessment on the response rather than the question – that is, on whether the jury was given a supplemental instruction or simply referred to previous instructions or testimony – *we disagree*.") (emphasis added). The *Musladin* Court denied a habeas petition under the AEDPA, but stated "were we reviewing the question before us de novo, we would find that Musladin was denied counsel at a 'critical stage,' thereby triggering *Cronic*'s rule of

automatic reversal." *Id.* at 842. In particular, the *Musladin* Court noted that the decision whether and how to respond to a jury note in the middle of deliberations is particularly critical.

> Jury deliberations are the apex of the criminal trial. All the evidence and arguments presented to the jury are processed and weighed at that time. Jurors are particularly susceptible to influence at this point, and any statements from the trial judge – no matter how innocuous – are likely to have some impact.

Musladin, 555 F.3d at 840 (emphasis added).

> Counsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response – or the decision whether to respond substantively or not – that is crucial. *See Frantz*, 533 F.3d at 743 ("The defendant's or attorney's presence may also be an important opportunity to try and persuade the judge to respond.")

Id. at 842. Thus, even where a judge responds by rereading previously agreed upon instructions, when the judge fails to consult with counsel before doing so, "it is the missed opportunity to influence the trial court's response to a jury question that is the significant moment." *Id.*

As noted above, the *Cronic* Court listed several stages of the trial process that are critical. Prior to and after *Cronic*, moreover, this Court has identified

several additional stages of the proceedings that are deemed "critical." *See Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079, 2085, 173 L.Ed.2d 955 (2009) (post-indictment interrogation); *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (entry of a guilty plea); *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988) (appeal). *See also Estelle v. Smith*, 451 U.S. 454, 471 (1981) (consent to a psychiatric interview); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (sentencing); *United States v. Wade*, 388 U.S. 218, 236-237 (1967) (post-indictment lineup).

In the course of deciding these cases, this Court has given at least five definitional statements of what represents a "critical stage" of the proceedings.

1) A critical stage presents a moment when "[a]vailable defenses may be irretrievably lost, if not then and there asserted." *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961).

2) A critical stage is one "where rights are preserved or lost." *White v. Maryland*, 373 U.S. 59, 60 (1963); *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (where the defendant's rights "may be affected").

3) Counsel's assistance is guaranteed "whenever necessary to mount a meaningful defence." *Wade*, 388 U.S. at 225 (internal quotations omitted).

4) Determination as to "whether a hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help

avoid that prejudice.'" *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (quoting *Wade*, 388 U.S. at 227).

5) A critical stage holds "significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 695-696 (2002).

As demonstrated by the conflicting opinions of the Ninth Circuit and the other Circuits, however, these pronouncements by this Court have proven to give the lower courts insufficient guidance to resolve these issues, particularly with respect to a trial court's formulation of a response and response to a jury question. Indeed, a deeply divided panel of the Sixth Circuit has explicitly called upon this Court to clarify these pronouncements. *Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2007) (holding that pretrial hearing to consolidate cases was not a critical stage because counsel did not forfeit objection which could have been renewed by motion to sever). The *Van* Court described these definitions of a critical stage as "question-begging," and invited this Court's clarification:

> One would welcome a comprehensive and final one-line definition of "critical stage." The case law available suggests that the pithy definitions we have do not simply capture the sometimes permissive or inclusive conclusions by the Supreme Court and our court that this or that period, moment, or event in the course of a criminal proceeding is a critical stage.

Id.

The split amongst the several circuits on this issue indicates that this Court should grant certiorari. Supreme Court Rule 10(a) (certiorari may be granted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue").

II. THE DECISIONAL LAW OF THE CIRCUITS IS ALSO IN CONFLICT ON WHETHER A DEPRIVATION OF COUNSEL AT A CRITICAL STAGE OF A TRIAL NECESSARILY CONSTITUTES STRUCTURAL ERROR.

Unlike the Sixth Circuit in *Hudson*, 351 F.3d 212, or the Fifth Circuit in *Hillsman*, 480 F.3d 333, the Ninth Circuit panel below did not expressly state that the trial court's receipt of a jury note was not a "critical stage," nor did it hold that the trial court's conceded error was non-constitutional. *See Mohsen*, 587 F.3d at 1031-1032. Indeed, because the Ninth Circuit panel held the error harmless beyond a reasonable doubt (albeit in an extremely summary fashion), the opinion below would indicate that the panel deemed the deprivation of the right to counsel an error of constitutional dimension, but one not structural in nature and thus subject to the *Chapman* test for determining prejudice. *Chapman v. California*, 386 U.S. 18, 24 (1967) (Trial error of constitutional dimension requires reversal unless proven harmless

beyond a reasonable doubt). In so holding, the opinion below created a conflict in circuit law on the question of whether a Sixth Amendment violation is structural in nature and thus can never be harmless.

In *United States v. Cronic*, 466 U.S. 648 (1984), this Court recognized that there are some errors which are structural in nature, "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. In particular, this Court held that courts are "require[d] . . . to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* at 659; *see Mickens v. Taylor*, 535 U.S. 162, 166 (2002) ("We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary."); *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (prejudice is presumed where counsel is denied at critical stage because "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost[,]" because "such circumstances . . . are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.") (citing *Cronic*, 466 U.S. at 658-659 & n.25); *see also Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (Unlike ordinary trial errors, "structural defects in the constitution of the trial mechanism . . .

defy analysis by harmless-error standards.") (internal quotation marks omitted).

The panel below explicitly disagreed with several published decisions of the Ninth Circuit holding that responding to a jury note is a critical stage of the proceedings and that the absence of counsel to assist in formulating a response to the jury's question is structural error requiring reversal per se on direct review. *Mohsen*, 587 F.3d at 1031-1032; *see United States v. Benford*, 574 F.3d 1228, 1232 (9th Cir. 2009) ("consideration of a jury note" is a critical stage of a trial requiring the presence of counsel and the deprivation of the right to counsel at a critical stage cannot be deemed harmless), *cert. denied*, ___ S. Ct. ___, 2010 WL 265890 (2010).

In *French v. Jones*, 332 F.3d 430 (6th Cir.), *cert. denied*, 540 U.S. 1018 (2003), the Sixth Circuit applied *Cronic*'s presumption of prejudice where trial counsel was absent when the state trial judge gave a supplemental instruction to a jury. *Id.* at 434, 438. In *Hudson*, 351 F.3d at 216-218, a divided panel of the Sixth Circuit distinguished its decision in *French* and held that where a court answers a jury question by simply repeating instructions previously given, there is no *Cronic* violation. There are intra-circuit conflicts on the issue of structural versus *Chapman* error in the context of jury notes in both the Sixth and Ninth Circuits.

This Court's statements in several cases indicate strongly that the *Mohsen* Court's decision below took

an unreasonably narrow view of the critical role the formulation of a response and response to a jury note plays in the middle of deliberations. Although this Court has not specifically held that the formulation of a response to a jury note is a Sixth Amendment critical stage, in *Rogers v. United States,* 422 U.S. 35 (1975), a pre-*Cronic* case, this Court discussed the importance of counsel's presence and advice when a jury note is discussed. In *Rogers*, this Court reversed a conviction where the trial court had responded to a jury question whether the court would accept a verdict of "Guilty as charged with extreme mercy of the Court;" the trial court responded in the affirmative, without consulting counsel, and the jury returned its verdict minutes later. *Id.* at 36-37.

Without discussing the Sixth Amendment right to counsel, this Court found that the trial court had violated the "rule of orderly conduct of trial by jury" which is essential to the "right to be heard" and which was later codified in Fed.R.Crim.P. 43; this Court thus reversed, without dissent. *Id.* at 38-39. In doing so, this Court addressed the importance of counsel's role in assisting the trial court in formulating a response to a jury note, no matter how innocuous the question might seem at first blush. Relying upon this Court's prior decision in *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), the *Rogers* Court reiterated " 'that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all

proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.'" *Rogers*, 422 U.S. at 38 (quoting *Fillippon*, 250 U.S. at 81). The *Rogers* Court further noted that the *Fillippon* Court had reversed the civil judgment, because the trial court "'erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction.'" *Rogers*, 422 U.S. at 38 (quoting *Fillippon*, 250 U.S. at 81).

The *Rogers* Court also relied upon this Court's prior decision in *Shields v. United States*, 273 U.S. 583 (1927). In *Shields*, the jury sent a note to the trial court indicating its inability to agree as to the guilt or innocence of the defendant. The parties had previously agreed that the trial court should hold the jury in deliberation until they had reached a verdict. Thus, the trial court responded to the note without consulting counsel, by sending a written direction that it must find the defendant 'guilty or not guilty.' *Id.* at 588-589; *see Rogers*, 422 U.S. at 39. The *Shields* Court held that the previous agreement by the parties could not be extended beyond its exact terms to include a response to a question from the jury; thus the agreement "'did not justify exception to the rule of orderly conduct of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict.'" *Rogers*, 422 U.S. at 39 (quoting *Shields*, 273 U.S. at 588-589).

Although the *Rogers* Court suggested that a Rule 43 violation might in some cases be deemed harmless, the Court held the error "was so fraught with potential prejudice" that the Court should reverse even though the issue of prejudice had not been raised in the lower courts. *Id.* at 40-41. In particular, in reversing the convictions, the Court stated that like the jury note in *Shields*, "the communication from the jury in this case was tantamount to a request for further instructions." *Id.* at 39. Thus, with input from defense counsel the trial court could have further instructed the jury; and the fact that the jury returned its verdict shortly after the trial court answered the question indicated the prejudice from responding without input from the parties. *Id.* at 40-41.

Both factors were also present in the instant case. Here, shortly after hearing the parties argue about the charges, and shortly after receiving the court's instructions on the charges, the jury nonetheless requested to see "a copy of the indictment with the specific charges" (ER 693, 205; Dkt. 519); this was clearly "tantamount to a request for further instructions" to clarify the specific charges which they were required to decide. As in *Rogers*, with input from defense counsel, the court could have provided a redacted indictment to the jury demonstrating which charges were at issue in phase one. The court could have further instructed the jury that the Lobo note referred to in the prosecutor's argument could not serve as a basis for a finding of materiality.

Additionally, the court could have admonished the jury that the prosecutor's vouching that "the truth is that the defendant is guilty of *each and every charge in the indictment*" was improper and should be disregarded, and reminding the jury that only the phase one charges should be considered in their deliberations.

The comments of the *Rogers* Court leaves no doubt that responses to jury notes are "so fraught with potential prejudice" that it should be deemed a *Cronic* critical stage, and that the absence of counsel should be deemed a structural Sixth Amendment error under the *Cronic* rubric, which requires reversal even absent a showing of prejudice. A review of the *Rogers* opinion further suggests that the Ninth Circuit's finding of harmless error is in conflict with this Court's opinions.

The *Rogers* Court's decision thus strongly indicates that the Ninth Circuit's decision below was erroneous. In any case, the confusion and split of decision within the Ninth Circuit and amongst the other Circuits indicates that there is an unsustainable confusion on this issue, and that this Court's review is required to settle this issue and further define what are "critical stages" of the proceedings.

CONCLUSION

Petitioner respectfully requests that this Court grant review to settle these important questions and resolve the conflicts within the Ninth Circuit's decisions and amongst the decisions of the different Circuits.

Dated: June 17, 2010

Respectfully submitted,

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Attorneys for Petitioner
Amr Mohsen

587 F.3d 1028

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Amr **MOHSEN**,
Defendant-Appellant.

No. 07-10059.

Argued and Submitted Aug. 31, 2009.
Filed Nov. 25, 2009.

Dennis P. Riordan, Riordan & Horgan, San Francisco, CA, for the appellant.

Amber S. Rosen, Assistant United States Attorney, San Jose, CA, for appellee.

Appeal from the United States District Court for the Northern District of California, William B. Shubb, District Judge, Presiding. D.C. No. CR-03-00095-WBS.

Before: B. FLETCHER and ANDREW J. KLEINFELD, Circuit Judges, and KEVIN THOMAS DUFFY,* District Judge.

PER CURIAM:

On February 27, 2006, Amr Mohsen was convicted by a jury of conspiracy, three counts of perjury,

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

subornation of perjury, eight counts of mail fraud, obstruction of justice, and contempt of court. On March 15, 2006, Amr Mohsen was convicted by the same jury (in Phase II of his bifurcated trial) of witness tampering and solicitation to commit arson. He appeals his conviction on a multitude of grounds. We reject his arguments for the reasons given below.

I. Jury Instructions

Mohsen's first contention is that the district court committed reversible error because it did not instruct the jury on substantive patent law. Defense counsel, however, failed to propose an instruction on patent law at trial. Therefore, we review for plain error. *United States v. McCormick,* 72 F.3d 1404, 1409 (9th Cir.1995); *United States v. Krasn,* 614 F.2d 1229, 1235 (9th Cir.1980).

Mohsen argues that in order to understand the element of materiality in the various perjury and fraud charges against him, the jury needed an instruction on substantive patent law. Mohsen is incorrect. This is not a patent case. This is a perjury and fraud case. The judge correctly instructed the jury on the materiality element of the perjury and fraud charges. *United States v. McKenna,* 327 F.3d 830, 839 (9th Cir.2003). Moreover, the jury heard sufficient unchallenged expert testimony regarding the substance of patent law and of the underlying dispute to understand and ultimately convict Mohsen

of the perjury and fraud charges. *See United States v. Pree,* 408 F.3d 855, 873 (7th Cir.2005).

II. Motion to Sever the Trial

Mohsen asserts that the district court abused its discretion by denying Mohsen's motion to sever the trial and order a separate trial of Counts 21-23. The test for abuse of discretion for failure to sever a trial is "whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States v. Decoud,* 456 F.3d 996, 1008 (9th Cir.2006) (quotation marks and citation omitted); *see also United States v. Lewis,* 787 F.2d 1318, 1321 (9th Cir.1986) ("The prejudice must have been of such magnitude that the defendant's right to a fair trial was abridged."). Here, there was no use of the Phase II counts or evidence in the Phase I proceedings, and the bifurcation process was not so manifestly prejudicial as to require reversal.

III. Constructive Amendment

Mohsen argues that the prosecutor's closing argument constructively amended the indictment in violation of Mohsen's Fifth Amendment rights. Because defense counsel did not raise this objection at trial, Mohsen's claim is reviewed for plain error. *United States v. Dipentino,* 242 F.3d 1090, 1094 (9th Cir.2001). There is no plain error here. The prosecutor's mention of the "Lobo notes" in the closing

argument did not change the terms of the indictment, nor did it offer an alternative factual basis for conviction so as to prejudice Mohsen's substantial rights. *See United States v. Adamson,* 291 F.3d 606, 614-15 (9th Cir.2002); *Dipentino,* 242 F.3d at 1094.

IV. The Jury Note

Mohsen contends that the judge should have consulted the parties or counsel before responding to the jury's request to see the indictment with the "specific charges." He is correct. The judge erred. However, the error was harmless beyond a reasonable doubt. *United States v. Barragan-Devis,* 133 F.3d 1287, 1289 (9th Cir.1998). The parties had previously agreed not to give the jury the indictment. The verdict form gave the jury the information the indictment would have given them, without the charges that were not before them. As the district judge made clear in a subsequent discussion with counsel, he thought that the jury had asked for the indictment only because there had been a delay in taking the instructions and verdict form to the jury room. The district court stated, "it was obvious . . . that if the jury would just take one look at the verdict form that they hadn't seen by the time they wrote the note, they would have been able to see what the specific charges are, because they are differentiated in the verdict form."

Mohsen argues that answering a jury question or request without first consulting defendant's counsel is

structural error always requiring reversal. That is incorrect. The judge's failure to consult the parties before refusing the jury's request to see the indictment was trial error. The cases Mohsen cites regarding structural error are distinguishable. In *Musladin v. Lamarque,* 555 F.3d 830 (9th Cir.2009), we upheld under AEDPA a state court's decision that a trial judge's response to a jury note asking for "amplification" of a jury instruction was not a "critical stage" of the trial process for purposes of determining whether the error was structural. We never suggested that all errors regarding jury communications during deliberations were subject to automatic reversal. Unlike the communication in *Musladin,* the jury note here was not a question about the law governing the jury's deliberations.

Mohsen also cites to *United States v. Benford,* 574 F.3d 1228 (9th Cir.2009). *Benford* holds, in the context of direct review of an ineffective assistance of counsel claim, that a pre-trial status conference was not a "critical stage" of the trial. *Id.* at 1232. Mohsen appears to rely on *Frantz v. Hazey,* 533 F.3d 724, 743 (9th Cir.2008) (en banc), which *Benford* cites in passing. *Frantz,* however, concerned a note from the jury about evidence that had not been admitted at trial. *See id.* at 741-42. The communication here, by contrast, made no substantive inquiry about the facts or the law.

In *United States v. Rosales-Rodriguez,* 289 F.3d 1106, 1110 (9th Cir.2002), we applied harmless error analysis to a trial judge's ex parte unsolicited note to

the jury with a supplemental instruction regarding the substitution of an alternate juror. In *Barragan-Devis,* 133 F.3d at 1289, we applied harmless error analysis to the trial judge's lack of response to a jury note. In *United States v. Frazin,* 780 F.2d 1461, 1469 (9th Cir.1986), we applied harmless error analysis where a trial judge responded to a jury note communicating deadlock with an ex parte instruction to continue deliberations.

V. Insufficient Evidence Claim

Mohsen argues that there was insufficient evidence to support his perjury conviction because his answers to the questions posed were "literally true" but misleading. We reject this argument. There was sufficient evidence for the jury to conclude that Mohsen understood the question as it was asked, and intentionally lied. *United States v. Camper,* 384 F.3d 1073, 1076 (9th Cir.2004).

VI. Contempt of Court Conviction

Mohsen was convicted for contempt of court for applying for a new passport to flee the country in violation of his conditional pre-trial release. Mohsen argues this conviction should be set aside for three reasons.

First, Mohsen argues that the conviction should be set aside because the contempt prosecution was initiated by the grand jury's indictment, not by the

judge who set the conditions of his release. This is incorrect. Both the trial court and the grand jury have power to bring contempt proceedings under 18 U.S.C. § 3148 and 18 U.S.C. § 401. *See, e.g., United States v. Armstrong,* 781 F.2d 700, 703-04 (9th Cir.1986); *Steinert v. U.S. Dist. Ct. for the Dist. of Nevada,* 543 F.2d 69, 70-71 (9th Cir.1976).

Second, Mohsen argues that the district court abused its discretion by admitting into evidence a note found in Mohsen's jail cell that had his wife's name at the top and no mailing address. The note was uncovered in a box of documents under a desk when the government executed a warrant to search Mohsen's jail cell for evidence of witness tampering, solicitation of a crime of violence, and obstruction of justice, and to seize notes and documents related to faking a psychological disorder or incompetence. Mohsen claims that the note is covered by the marital privilege, and that the search itself was conducted in violation of *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Both of Mohsen's arguments are incorrect. The marital privilege does not apply because, as the district court found, Mohsen had presented "no evidence whatsoever" that he intended to deliver the message to his wife. *See also United States v. Montgomery,* 384 F.3d 1050, 1056-57 (9th Cir.2004). Nor did the search and seizure violate *Massiah.* The search and seizure warrant was justified by an affidavit that noted statements made to the undercover informant concerning illegal activities with which the defendant had not yet been

charged, and the objects to be searched for and seized all related to potential criminal acts that had not yet been charged. That the police inadvertently found evidence relating to the contempt charge during the search and seizure does not invalidate the search warrant. *See United States v. Ewain,* 88 F.3d 689, 693 (9th Cir.1996).

Finally, Mohsen argues that there was insufficient evidence for the jury to find beyond a reasonable doubt that Mohsen applied for a passport. We disagree. In addition to the evidence that Mohsen had made reservations for overseas travel requiring a passport, that he had gone to the consulate, and that in his car he had copies of the necessary documents to obtain a passport, the note found in his jail cell made specific reference to a "2004 application" for an Egyptian passport. We conclude that there was sufficient evidence for a jury to find beyond a reasonable doubt that Mohsen had applied for a new passport.

VII. Improper Vouching

Mohsen correctly contends that the prosecutor improperly vouched during the closing argument of Phase I. Because the defense did not object at trial to the prosecutor's comments, the prosecutor's vouching is reviewed for plain error. *United States v. Williams,* 989 F.2d 1061, 1071-72 (9th Cir.1993). We find that the prosecutor's rhetorical use of the phrase "I think" did not constitute reversible error.

Mohsen also argues that the prosecutor violated the advocate-witness rule and engaged in improper vouching in Phase II of the trial. Because Mohsen did not raise this objection to the district court, the claim is reviewed for plain error. *United States v. Cabrera*, 201 F.3d 1243, 1246 (9th Cir.2000). The prosecutor's conduct in Phase II did not constitute vouching or violate the advocate-witness rule. The prosecutor did not suggest that her questions or closing argument were based on private knowledge or anything other than the evidence presented at trial. *Cf. United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir.1991). Moreover, given the weight of tape-recorded evidence supporting the Phase II convictions, there is no plain error. *Id.*

VIII. Ineffective Assistance of Counsel

Mohsen argues that his trial counsel's failure to request an instruction on the underlying substantive patent law constituted ineffective assistance of counsel. Mohsen also argues that his Phase II convictions should be overturned for ineffective assistance of counsel. "Ineffective assistance claims, however, are ordinarily left for collateral habeas proceedings due to the lack of a sufficient evidentiary record as to what counsel did, why it was done, and what, if any, prejudice resulted." *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir.2000) (internal quotation marks and citation omitted). Here, the record is not sufficiently developed and Mohsen's counsel was not so inadequate as to deny Mohsen his Sixth Amendment right

to counsel. We therefore decline to consider Mohsen's ineffective assistance claims on direct appeal.

IX. Sentencing Enhancement

Mohsen argues that the district court erred at sentencing in calculating the amount of loss attributable to his fraudulent scheme. We disagree. There was sufficient evidence to justify the district court's conclusion that Mohsen intended his scheme to cause losses totaling more than forty million dollars. Thus, under the 1998 guidelines, the 17 point upward sentence enhancement was appropriate. U.S.S.G. § 2F1.1(b)(1)(R) (1998).

X. Request for Remand

Mohsen contends that this Court should remand this case for a renewed motion for new trial on the grounds that he was deprived of his right to counsel of his choice. We disagree. The district court did not abuse its discretion when it rejected (after briefing and a hearing on conflict of interest issues) Mohsen's choice of substitute counsel due to the substitute attorney's conflict of interest. *See Miller v. Blacketter*, 525 F.3d 890, 895 (9th Cir.2008) ("A defendant does not have the right to be represented by . . . an attorney with a conflict of interest. . . ."). Nor did the district court abuse its discretion in refusing to grant a three month continuance requested by Mohsen's second choice of substitute counsel, even where the attorney decided not to take the appointment because

of the court's decision. The district court did not deny the substitution of the second counsel chosen, but exercised its discretion to deny the continuance requested by that attorney. The district court has broad discretion to grant or deny motions for continuances. *United States v. Garrett,* 179 F.3d 1143, 1145 (9th Cir.1991). Mohsen's request that we remand for a renewed retrial hearing with new counsel is denied.

XI. Spillover prejudice

Mohsen argues that if any of his convictions in Phase I are vacated, his convictions in Phase II must also be vacated due to "the risk of prejudicial spillover." Because we affirm all of Mohsen's Phase I convictions, we do not reach this question.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
WILLIAM B. SHUBB, JUDGE

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

AMR MOHSEN,

DEFENDANT.

NO. CR 03-0095 WBS

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SAN FRANCISCO, CALIFORNIA
FRIDAY, SEPTEMBER 15, 2006

TRANSCRIPT OF PROCEEDINGS

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BY: ROBIN L. HARRIS,
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FOR THE DEFENDANT:
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* * *

[59] THAT BRINGS ME TO THE FINAL ARGUMENT, WHICH IS THE ONLY ONE THAT WAS NOT RAISED AND DISCUSSED AND DENIED DURING THE COURSE OF TRIAL, HAVING TO DO WITH THE NOTE THAT THE JURY SENT, AND THE COURT'S RESPONSE TO IT.

I MUST ADMIT THAT I HAD NOT READ THE *UNITED STATES VERSUS BARRAGAN-DEVIS*, D-E-V-I-S, 133 F.3D 1287, NINTH CIRCUIT, 1998, BEFORE THIS MOTION WAS MADE.

OVER THE COURSE OF MORE THAN 15 YEARS OF TRYING CASES AS A JUDGE, I HAVE SEEN A LOT OF NOTES FROM THE JURY. IT IS MY PRACTICE, FROM WHICH I NEVER DEPART, THAT IF ANY QUESTION IS ASKED OF SUBSTANCE I CONFER WITH THE LAWYERS. THAT'S WHY I, UNLIKE A LOT OF OTHER JUDGES, KEEP THE LAWYERS ON A SHORT LEASH DURING BREAKS BECAUSE I NEED THEM TO COME IN QUICKLY IF THE JURY HAS A QUESTION.

AND I ALWAYS HAVE THE DEFENDANT PRESENT IN COURT WHEN I DO ANYTHING, UNLIKE A LOT OF OTHER JUDGES WHO WILL CONFER WITH THE LAWYERS ABOUT THINGS LIKE JURY INSTRUCTIONS OR THINGS THAT [60] THEY THINK ARE PROCEDURAL WITHOUT THE DEFENDANT PRESENT.

I WON'T DO THAT. I HAVE THE DEFENDANT PRESENT AT ALL STAGES OF THE PROCEEDINGS. AND I WILL CONSULT WITH THE LAWYERS ON ANY QUESTION THAT COMES FROM THE JURY OF SUBSTANCE.

QUITE FRANKLY, I DID NOT REGARD THIS QUESTION AS A QUESTION IN THAT CONTEXT. THE KINDS OF QUESTIONS THAT I HAVE IN THE PAST ROUTINELY NOT CONSULTED WITH THE ATTORNEYS ABOUT, JUST SOME EXAMPLES THAT I CAN THINK OF ARE THE JURY HAS ASKED IF THEY CAN HAVE COLORED PENCILS. SO I'LL SEND THEM A LITTLE NOTE AND SAY USUALLY:

> "YES," IF I HAVE THEM, BUT "NO" IF I DON'T HAVE THEM.

I REMEMBER ONE TIME THE JURY ASKED IF THEY COULD HAVE BOTTLED WATER. AND I WROTE BACK A NOTE THAT SAID:

> "THERE IS A WATER FAUCET IN THE JURY ROOM."

SO, IN EFFECT, THAT WAS "NO."

SINCE THEN PARENTHETICALLY MY FELLOW JUDGES ON THE COURT HAVE THOUGHT THAT WAS WRONG AND WE NOW PROVIDE BOTTLED WATER TO THE JURORS.

I'VE HAD THE JURORS SEND A NOTE ASKING IF THEY COULD USE THEIR CELL PHONES

IN THE JURY ROOM. IN PARTICULAR, THAT HAD TO DO WITH THE FACT THAT THEY MIGHT BE DELIBERATING LATE AND THEY WANTED TO CALL THEIR FAMILIES. AND I HAVE NOT FOUND IT NECESSARY TO CONSULT WITH THE LAWYERS IN RESPONSE TO THOSE QUESTIONS, EITHER.

[61] READING THE LANGUAGE OF *BARRAGAN-DEVIS* LITERALLY, IT WOULD APPEAR THAT THE COURT IS SAYING THAT IT IS ALWAYS ERROR TO FAIL TO DISCUSS ANY INQUIRY FROM THE JURY WITH THE LAWYERS AND WITH THE DEFENDANT PRESENT.

THE ANALYSIS THEN GOES ON TO FIND IN THAT CASE THAT THE ERROR WAS HARMLESS. BUT I DON'T THINK THAT A JUDGE, PARTICULARLY A DISTRICT JUDGE, SHOULD EVER KNOWINGLY OR DELIBERATELY COMMIT ERROR JUST BECAUSE THE JUDGE THINKS IT IS HARMLESS ERROR.

AND SO UNTIL I GET SOME CLARIFICATION OF THIS FROM THE NINTH CIRCUIT IN OTHER CASES I THINK IT WILL BE MY PRACTICE FROM HERE ON TO CONFER WITH COUNSEL WITH THE DEFENDANT PRESENT EVEN ON THOSE QUESTIONS THAT I HAVE GIVEN YOU EXAMPLES OF HAVING TO DO WITH PENCILS, WATER AND SO FORTH, BECAUSE THAT IS WHAT THE SUPREME COURT – WHAT THE NINTH CIRCUIT

SAYS. AND I DON'T THINK A DISTRICT JUDGE SHOULD DO ANYTHING THAT IS ERROR.

IF IT WAS ERROR HERE, I AM CONFIDENT THAT THE CIRCUIT WOULD FIND THIS TO BE HARMLESS ERROR.

I'VE EXPLAINED ALREADY – AND I THINK MR. BALAZS HAS AGREED – THAT MY REASONS FOR DECIDING NOT TO GIVE THE INDICTMENT TO THE JURY IN THE FIRST PLACE WERE SOUND. AND MS. HARRIS HAS REFRESHED MY RECOLLECTION THAT WE DISCUSSED IT IN COURT. AND SHE HAS TOLD ME, ALTHOUGH I DIDN'T RECALL IT, THAT THE LAWYERS AGREED THAT THAT WOULD BE A GOOD IDEA.

IF I HAD CONFERRED WITH YOU AND YOU HAD SUGGESTED [62] THAT I DO ANYTHING OTHER THAN WHAT I DID, I WOULD NOT HAVE FOLLOWED THAT SUGGESTION FOR THE FOLLOWING REASONS: AS I SAID, IF YOU LOOK AT THE TIMING OF THIS THE CLERK BROUGHT THIS TO ME RIGHT AFTER HE HAD DELIVERED THE INSTRUCTIONS, THE VERDICT FORM, AND THE EXHIBITS TO THE JURORS.

I DID NOT FEEL AND STILL STRONGLY DO NOT FEEL THAT THE JURY COULD HAVE AT ANY DELIBERATION IN SUBSTANCE FOUND ANY OF THE ISSUES, IN PARTICULAR THE ONES THAT MR. BALAZS SUGGESTED, DURING THAT SHORT PERIOD OF TIME.

IT WOULD HAVE BEEN IMPOSSIBLE. IT WAS OBVIOUS TO ME THEN, AS IT IS NOW, THAT WHAT THEY ARE WERE LOOKING FOR WAS THAT THEY HAD JUST STARTED THEIR DELIBERATIONS AND THEY WANTED TO HAVE SOME KIND OF A CHECKLIST OR SOME KIND OF AN INDICATION AS TO WHICH COUNTS RELATED TO WHICH MAILING OR WHICH ALLEGEDLY PERJURIOUS STATEMENT. AND THAT THEY DIDN'T HAVE A CHANCE YET TO LOOK AT THE VERDICT FORM TO SEE IF THE INFORMATION THEY NEEDED WAS IN THE VERDICT FORM.

THAT IS OBVIOUS TO ME THEN, AS IT IS NOW. AS I ALSO SAID, I WANTED THE JURY TO START DELIBERATING. IT IS NEVER A GOOD IDEA TO DELAY THE JURY IN STARTING TO DELIBERATE. THAT'S WHY SOMETIMES I AM CRITICIZED FOR BEING A LITTLE IMPATIENT WITH THE LAWYERS AND THE CLERK IN GETTING THE EXHIBITS IN TO THE JURY ROOM IMMEDIATELY, BECAUSE I DON'T WANT THEM GOING IN THERE AND STARTING TO TALK ABOUT THE WRONG THINGS OR STARTING TO BE MISGUIDED IN THEIR DELIBERATIONS.

[63] IT'S IMPORTANT THAT THEY START THEIR DELIBERATIONS ON THE RIGHT FOOT. IF I HAD TAKEN THE TIME TO FIND YOU LAWYERS AND BRING YOU BACK INTO THIS COURT AND HAVE THE MARSHAL BRING MR. MOHSEN BACK TO COURT IT COULD HAVE

WELL BEEN A HALF HOUR. AND I'M NOT EXAGGERATING ON THAT, BELIEVE ME.

IN THIS COURTROOM HERE IT'S MY EXPERIENCE IT TAKES A LONG TIME – AND I DON'T KNOW WHAT GOES ON UP THERE – TO GET THE DEFENDANT FROM WHEREVER THEY KEEP HIM TO THIS COURTROOM.

I DIDN'T WANT THE JURY TO BE WAITING FOR AN ANSWER TO A QUESTION OR THINKING THAT THEY SHOULDN'T START FULLY DELIBERATING THIS CASE DURING THAT PERIOD OF TIME WHILE I BROUGHT YOU DOWN HERE TO ASK YOU WHAT TO DO.

I KNEW WHAT I WOULD HAVE DONE EVEN IF YOU HAD SUGGESTED SOMETHING DIFFERENT.

THIS IS NOT, AS MR. BALAZS CHARACTERIZES IT, A PLEA FROM THE JURY FOR MORE INFORMATION BECAUSE THEY DON'T UNDERSTAND THE CHARGES. IT IS NOT A REQUEST FOR THE INDICTMENT BECAUSE THEY THOUGHT THEY NEEDED IT. IT IS A SIMPLE QUESTION, QUOTE:

> "IS THERE A COPY OF THE INDICTMENT WITH THE SPECIFIC CHARGES THAT WE CAN SEE?"

COUNSEL AND THE COURT HAD ALREADY AGREED THAT THAT WOULD NOT BE AVAILABLE, AND MY ANSWER WAS SIMPLE.

SO FOR THOSE REASONS, IF IT WAS ERROR, I'M CONFIDENT THE NINTH CIRCUIT WOULD FIND IT WAS HARMLESS. I FURTHER DON'T REALLY BELIEVE THAT IT WAS ERROR, BECAUSE I THINK IF THE NINTH [64] CIRCUIT WERE TO CLARIFY WHAT THEY MEANT TO SAY IN *BARRAGAN-DEVIS* THEY WOULD REFINE IT TO SAY THAT IT HAS TO DEAL WITH QUESTIONS OF SUBSTANCE, SUCH AS THEY WANT FURTHER INSTRUCTIONS ON A PARTICULAR ISSUE, OR THEY WANT TO KNOW THE DEFINITION OF A TERM, THAT TYPE OF THING.

THAT'S PROBABLY ENOUGH SAID ON THAT LAST ARGUMENT. I THINK I'VE COVERED ALL THE ARGUMENTS OF MR. BALAZS' MOTION. IF I HAVEN'T SPECIFICALLY ADDRESSED THEM, IT'S MY INTENTION TO DENY THE MOTION IN ITS ENTIRETY IN REGARD TO NOT ONLY THOSE I HAVE MENTIONED HERE AND COUNSEL HAVE MENTIONED HERE, BUT WITH REGARD TO THE SUM TOTAL OF THE ARGUMENTS THAT WERE MADE IN MR. BALAZS' MOTION.

SO THAT MOTION IS DENIED. THE MOTION FOR NEW TRIAL IS DENIED, AND THE MOTION FOR JUDGMENT OF ACQUITTAL IS DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AMR MOHSEN, Defendant-Appellant.	No. 07-10059 D.C. No. CR-03-00095-WBS Northern District of California, San Francisco ORDER (Filed Feb. 2, 2010)

Before: B. FLETCHER and KLEINFELD, Circuit Judges, and DUFFY,*

The panel has voted unanimously to deny the petition for rehearing. Judge Kleinfeld voted to deny the petition for rehearing en banc, and Judges Fletcher and Duffy have recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.